UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS

and

Case Nos.

32-CA-25247

32-CA-25248

32-CA-25266

32-CA-25271

through

32-CA-25308

32-CA-25498

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN REPLY TO RESPONDENT'S ANSWERING BRIEF

On August 9, 2011, Administrative Law Judge Burton Litvack, herein the Judge, issued his Decision and Recommended Order in the above-captioned matter wherein he found, among other things, that Piedmont Gardens, herein the Respondent, violated Section 8(a)(1) of the Act by engaging in surveillance and/or creating the impression that it was engaging in surveillance of employees who were engaged in a strike vote and by discriminatorily enforcing its no-access policy by requiring employees who were assisting with the strike vote to leave the facility while allowing off-duty employees on the premises for other purposes, and violated Section 8(a)(1) and (5) of the Act by unlawfully refusing to furnish relevant information regarding striker replacements. The Judge's decision in those regards is wholly supported by appropriate findings of fact and conclusions of law.

However, the Judge either rejected or refused to find that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate or belatedly reinstating 38 bargaining unit employees who engaged in a strike at Respondent's facility. While the Judge correctly determined that Respondent relied on unlawful factors in making its decision to permanently replace 38 of its striking employees, specifically, a desire to teach striking employees a lesson and to hire individuals who would cross a picket line in the event of future strikes, the Judge concluded that, absent evidence that Respondent's decision was calculated to achieve some unlawful purpose that was extrinsic to or unrelated to the strike itself, Respondent's discriminatory motivation for permanently replacing 38 striking employees is irrelevant and, therefore, it did not violate the Act as alleged. The Acting General Counsel has filed exceptions and a supporting brief with regard to these matters and Respondent has filed an answering brief thereto. This brief is in reply to Respondent's answering brief.¹

For the most part, Respondent's answering brief restates the Judge's view of the scope and meaning of the "independent unlawful purpose" language set forth in *Hot Shoppes, Inc.*² and why it supposedly does not apply in this case. The Acting General Counsel's contrary view is clearly set forth in his brief in support of his exceptions and will not be repeated here. However, Respondent's answering brief makes a number of assertions that warrant further specific response.

References in this brief to the Judge's Decision shall be designated by page and line number as follows: ("ALJD [page]:[line]").

² 146 NLRB 802, 805 (1964).

1. The Hot Shoppes "independent unlawful purpose" language is a recognized exception to the right of employers to hire permanent replacements under NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) and remains viable Board law.

Respondent in its answering brief contends that *Hot Shoppes* "independent unlawful purpose" language did not carve out an exception to *Mackay* and that it would be improper for the Board to recognize such an exception. This argument is refuted not only by the very language in *Hot Shoppes* that is at the core of this discussion, but by the Board's two recent *Avery Heights* decisions, where in both cases the Board recognized the very exception that Respondent asserts does not exist and where the only question was whether the evidence was sufficient to establish that the employer there had an "independent unlawful purpose" in permanently replacing its striking employees. As the Board stated in *Avery Heights I*: "As discussed above, the hiring of permanent replacements during an economic strike has a legitimate business justification under well-settled law. It is simply too late in the law's development to argue the contrary. The only argument available to the General Counsel rests on motive, " (at 1308, emphasis added). Accordingly, there should be no real issue concerning the continuing viability of the *Hot Shoppes* "independent unlawful purpose" exception.

2. The existence of an "independent unlawful purpose" does not turn on whether it is intrinsic or extrinsic to the strike but rather on whether the motive is in retaliation for employees' exercise of their protected right to strike or is to interfere with their exercise of that right in the future.

As did the Judge, Respondent argues that the *Hot Shoppes* "independent unlawful purpose" language applies only to situations where the permanent replacement of strikers is extrinsic or, in the Judge's words, "unrelated to or extraneous," to the strike itself, i.e.,

³ Avery Heights I, 343 NRB 1301 (2004) and Avery Heights II, 350 NLRB 214 (2007).

that it had some other unlawful purpose, such as the fomenting of a future decertification election (ALJD 26:29-48 and 27:1-2): However, there is nothing in *Hot Shoppes* that indicates that the Board had any such distinction in mind. Moreover, to the extent that both the Judge and Respondent believe that such a distinction is necessary because otherwise the Acting General Counsel's view would have the exception swallowing the rule, that appears based on a misconstruction of the Board's literal language. The Hot Shoppes language is that "the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose." As set forth previously, the proper interpretation of this language is that if there is no evidence of an unlawful motive, then the motive for the hiring of permanent replacements (such as whether there was in fact a business need to do so) is irrelevant. This is a common-sense and reasonable interpretation of the language that is consistent with long-standing Board law and is one that makes unnecessary the Judge's and Respondent's artificial distinction between unlawful purposes that are either intrinsic or extrinsic to the strike and their tortured logic that would say that replacing strikers in order to foment a future decertification election, for example, would be unlawful, but punishing employees for striking by permanently replacing them - which would appear classically discriminatory and unlawful - would not be. In this regard, the Acting General Counsel notes that the Board's discussion in Avery Heights I centered on whether there was an unlawful motive or not and not on whether any such unlawful motive was or was not extrinsic to anything. Moreover, after the Board accepted the remand in that case and recognized the law of the case as "that the logical implication of (the employer's) secrecy was an illicit motive," it did not thereafter engage in any discussion about whether the illicit motive that it ultimately found was or

was not extrinsic to the strike.⁴ Accordingly, the Acting General Counsel submits that the proper analysis in this case is whether there is evidence that Respondent had an unlawful motive (or purpose) in replacing the strikers and that the lawfulness of its conduct should be analyzed and decided on that basis.⁵

3. The record establishes that Respondent had an unlawful motive in permanently replacing the strikers.

Respondent's protests notwithstanding, the record contains persuasive evidence that its motive for permanently replacing the striking employees was to punish them for striking and to make sure they would not strike again. As reflected in Respondent attorney Durham's own words, Respondent wanted "to teach the strikers and the Union a lesson" and, by permanently replacing employees who would be likely future strikers, to avoid such strikes in the future. The lesson that Durham wanted to teach the Union and the strikers on its face is punitive and discriminatory and establishes the necessary unlawful motive in this case. The illicit nature of Respondent's permanent replacement of the strikers is further demonstrated by the secretive nature in which it was conducted. Thus, despite Respondent's claim that it had "openly" hired permanent replacements

And it appears that the motive in that case, if anything, was "intrinsic" to the strike, i.e., to punish the strikers and to break the union's solidarity. Avery Heights II at 214.

In this regard, both the Judge and Respondent cite Belknap v. Hale, 463 U.S. 491 (1983) as support for their view of how Hot Shoppes' "independent unlawful purpose" language should be applied. That case, however, offers little support for their position. The Court there cited the Board's relevant Hot Shoppes language in its entirely, including the "independent unlawful purpose" exception language, in response to a suggestion made in the dissent and the concurrence that there may not have been an economic motive (need) to hire permanent replacements. The Court did not have before it the question of what "independent unlawful purpose" means or the question of whether such a purpose had to be extrinsic to the strike. Accordingly, the Court's failure to make a clear statement on the issue is hardly as meaningful as the Judge appears to believe. (ALJD 27:2-10)

Similarly, Respondent's reliance on *American Optical Company*, 138 NLRB 681 (1962) is also misplaced. Apart from the case being pre-*Hot Shoppes*, the Board in *Hot Shoppes* specifically cited *American Optical* as a case being subject to its "independent unlawful purpose" language. Id. at 805.

(answering brief, p. 10), the record is clear that Respondent engaged in this conduct secretly beginning on the second day of the strike and admitted to it only on August 6, after the Union's attorney sought confirmation of rumors that he had heard about the striking employees being locked out. Respondent's conduct is thus manifestly different from the innocent employer in *Hot Shoppes*, which openly told employees before any strike that all strikers would be permanently replaced (Id., at 803), and troublingly parallel to that of the guilty employer in *Avery Heights*, which also secretly hired permanent replacements.

4. Summary and conclusion.

For the reasons set forth above, it is respectfully requested that the Board reject Respondent's arguments in its answering brief, that it find merit to the Acting General Counsel's exceptions, and that it find that Respondent violated Sections 8(a)(1) and (3) of the Act as alleged and issue an order remedying those unfair labor practices.

DATED AT Oakland, California this 31st day of October 2011.

Respectfully submitted,

Kenneth Ko

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DATE OF MAILING: October 31, 2011

<u>AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL</u> <u>COUNSEL'S BRIEF IN REPLY TO RESPONDENT'S ANSWERING BRIEF</u>

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 31st day of October 2011.

DESIGNATED AGENT

st Shirle M. Owens

MATIONAL LABOR RELATIONS BOARD